Abdul Hakim @ Ramizu bin Othman & Ors v Menteri Dalam Negeri, Malaysia

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–137–08 OF 2016
AZIZAH NAWAWI J
29 SEPTEMBER 2017

Administrative Law — Judicial review — Certiorari — Home Minister rejected appeal by Islamic group against refusal of Registrar of Societies ('ROS') to register group as society under Societies Act 1966 ('the SA') — Both decisions of the ROS and Minister based on fatwa issued by Selangor State Fatwa Committee declaring that ideologies and religious practice of group were deviant and against mainstream Islam — Whether Minister considered as factor probability that group's activities might prejudice public order — Whether Minister's decision was not illegal, invalid, irrational or ultra vires arts 10 and 11 of the Federal Constitution and did not deserve to be quashed

The applicants had applied to the Registrar of Societies ('the ROS') to register their group called 'Organisasi Hizbut Tahrir Malaysia' ('Hizbut Tahrir') as a society under the Societies Act 1966 ('the SA'). The ROS rejected the application under s 7(3)(a) of the SA on the ground Hizbut Tahrir was 'likely to be used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public order, good order or morality in Malaysia'. The decision was based on a letter the ROS received from the Selangor Islamic Affairs Department stating that the Selangor State Fatwa Committee had issued a fatwa stating that the ideologies and teachings of Hizbut Tahrir were deviant and against the teachings of Islam followed by the Sunnah Wal Jama'ah. The fatwa was *gazetted* under s 47 of the Religion of Islam (State of Selangor) Enactment 2003 ('the 2003 Enactment'). Pursuant to s 18 of the SA, the applicants appealed to the respondent against the decision of the ROS. The respondent dismissed the appeal ('the decision'). In their instant application for judicial review, the applicants sought to quash the decision on the ground it was illegal, invalid, irrational and ultra vires arts 10 and 11 of the Federal Constitution.

Held, dismissing the application with costs:

(1) Although art 10(1)(c) of the Federal Constitution provided that all citizens had the right to form associations, art 10(2)(c) empowered Parliament to impose such restrictions on that right as it deemed 'necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality'. Since the decision of the ROS

was made premised on s 7(3)(a) of the SA and the Court of Appeal had previously held s 7 of the SA to be valid and not in contravention of art 10(1)(c) the decisions of the ROS and the respondent in the instant case were not ultra vires art 10(1)(c) (see paras 24–27).

(2) The fatwa issued by the Selangor State Fatwa Committee, declaring that the practice of the ideologies of Hizbut Tahrir was deviant and against the teachings of Islam in accordance with Sunnah Wal Jama'ah was legal and constitutional and formed the basis of the decisions of the ROS and the respondent. As such, there was no breach of the applicants rights under arts 11(1) or 11(3)(b) of the Federal Constitution. The applicants had failed to show that the practice of the ideologies of Hizbut Tahrir was of a compulsory nature or an integral practice of the religion of Islam that was protected under art 11(1) of the Federal Constitution. The applicants also did not provide any evidence to support their assertion that Hizbut Tahrir had existed in Malaysia since 2009 without causing any prejudice to public order in the country (see paras 32, 34, 37–38, 42, & 48).

(3) It could not be said that the decisions of the ROS and the respondent were irrational as they were based on the findings and fatwa of the Selangor Fatwa Committee which ruled that the ideologies and teachings of Hizbut Tahrir were deviant. The issue of deviant Islamic teachings in Muslim majority Malaysia was a matter of public interest and could affect public order. Furthermore, since the fatwa on Hizbut Tahrir had become binding law, albeit only in Selangor pursuant to the 2003 Enactment, the respondent had no option but to dismiss the applicants appeal (see paras 40–41, 54 & 56–58).

(4) There was no issue of procedural impropriety in this case. Although the letter informing the applicants that the respondent had rejected their appeal was not issued by the respondent himself but by one Norehan bt Hj Abdullah, it was merely an administrative letter informing the applicants of the respondent's decision. The letter itself was not part of the decision making process of the respondent (see paras 59–61).

[Bahasa Malaysia summary

Pemohon-pemohon telah memohon kepada Pendaftar Persatuan ('Pendaftar') untuk mendaftar persatuan mereka yang dikenali sebagai 'Organisasi Hizbut Tahrir Malaysia' ('Hizbut Tahrir') sebagai persatuan di bawah Akta Persatuan 1966 ('AP'). Pendaftar menolak permohonan di bawah s 7(3)(a) AP atas alasan Hizbut Tahrir adalah 'likely to be used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public order, good order or morality in Malaysia'. Keputusan adalah didasarkan ke atas surat yang diterima oleh Pendaftar daripada Jabatan Hal Ehwal Islam Negeri yang menyatakan bahawa Jawatankuasa Fatwa Negeri Selangor telah mengeluarkan

fatwa menyatakan bahawa ideologi dan ajaran Hizbut Tahrir adalah menyimpang dan menentang ajaran Islam yang mengikuti Sunnah Wal Jama'ah. Fatwa diwartakan di bawah s 47 Enakmen Agama Islam (Negeri Selangor) 2003 ('Enakmen 2003'). Berikutan s 18 AP, pemohon-pemohon merayu kepada responden terhadap keputusan Pendaftar. Responden menolak rayuan tersebut ('keputusan'). Dalam permohonan ini untuk semakan kehakiman, pemohon-pemohon memohon untuk membatalkan keputusan atas alasan salah di sisi undang-undang, tak sah, tak rasional dan ultra vires perkara 10 dan 11 Perlembagaan Persekutuan.

Diputuskan, menolak permohonan dengan kos:

(1) Walaupun perkara 10(1)(c) Perlembagaan Persekutuan memperuntukkan bahawa kesemua rakyat mempunyai hak untuk membentuk persatuan, perkara 10(2)(c) memberi kuasa kepada Parlimen untuk mengenakan sekatan sedemikian atas hak tersebut kerana ia dianggap 'necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality'. Memandangkan keputusan Pendaftar dibuat atas dasar s 7(3)(a) AP dan Mahkamah Rayuan telah terdahulu memutuskan s 7 AP adalah sah dan tidak bertentangan perkara 10(1)(c) keputusan Pendaftar dan responden dalam kes ini tidak ultra vires perkara 10(1)(c) (lihat perenggan 24–27).

(2) Fatwa yang dikeluarkan oleh Jawatankuasa Fatwa Negeri Selangor, mengisytiharkan bahawa amalan ideologi Hizbut Tahrir adalah menyimpang dan menentang ajaran agama Islam mengikut Sunnah Wal Jama'ah adalah sah dan berperlembagaan dan membentuk asas keputusan Pendaftar dan responden. Oleh itu, tidak terdapat pelanggaran hak pemohon-pemohon di bawah perkara 11(1) atau 11(3)(b) Perlembagaan Persekutuan. Pemohon-pemohon telah gagal untuk menunjukkan bahawa amalan ideologi Hizbut Tahrir adalah sifat wajib atau amalan penting agama Islam yang dilindungi di bawah perkara 11(1) Perlembagaan Persekutuan. Pemohon-pemohon juga tidak memberikan apa-apa keterangan untuk menyokong hujahan mereka bahawa Hizbut Tahrir telah wujud di Malaysia semenjak 2009 tanpa menyebabkan apa-apa prejudis kepada ketenteraman awam dalam negara (lihat perenggan 2, 34, 37–38, 42, & 48).

(3) Ia tidak dapat dikatakan bahawa keputusan Pendaftar dan responden adalah tidak rasional memandangkan ia didasarkan atas dapatan dan fatwa Jawatankuasa Fatwa Negeri Selangor yang memutuskan bahawa ideologi dan ajaran Hizbut Tahrir adalah menyimpang. Isu penyimpangan ajaran Islam dalam majoriti Islam Malaysia adalah perkara kepentingan awam dan boleh menjejaskan ketenteraman awam. Selanjutnya, memandangkan fatwa ke atas Hizbut Tahrir menjadi undang-undang yang mengikat walaupun hanya di Selangor berikutan

Enakmen 2003, responden tidak mempunyai pilihan tetapi untuk menolak rayuan pemohon-pemohon (lihat perenggan 40–41, 54 & 56–58).

(4) Tidak terdapat isu ketidakpatuhan prosedur dalam kes ini. Walaupun surat memberitahu pemohon-pemohon bahawa responden telah menolak rayuan mereka tidak dikeluarkan oleh responden sendiri tetapi oleh seorang yang bernama Norehan bt Hj Abdullah, ia hanya surat pentadbiran memberitahu pemohon-pemohon mengenai keputusan responden. Surat itu sendiri bukan bahagian proses pembuatan keputusan responden (lihat perenggan 59–61).]

Notes

For cases on certiorari, see 1(1)*Mallal's Digest* (5th Ed, 2017 Reissue) paras 411–436

Cases referred to

Booi Kim Lee v Menteri Sumber Manusia & Anor [1999] 3 MLJ 515, HC (refd)

Chan Hon Fun (President and Office Bearer of 'Persatuan Kwong Siew Selangor dan Wilayah Persekutuan') v Pendaftar Pertubuhan & Anor [2009] MLJU 1700, HC (refd)

Council of Civil Service Unions and others v Minister for the Civil Service [1985] AC 374, HL (refd)

Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) v SIS Forum (Malaysia) [2012] 6 MLJ 340; [2012] 9 CLJ 297, CA (distd)

Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213; [2007] 1 CLJ 19, CA (refd)

Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors [2012] 4 MLJ 281; [2012] 4 CLJ 717, FC (refd)

Mamat bin Daud & Ors v Government of Malaysia [1988] 1 MLJ 119, SC (refd)

Marzuki Abdul Aziz v Ketua Polis Negara & Anor [2003] 3 MLJ 390, CA (refd)

Meor Atiqulrahman bin Ishak (an infant, by his guardian ad litem, Syed Ahmad Johari bin Syed Mohd) & Ors v Fatimah bte Sihi & Ors [2006] 4 MLJ 605; [2006] 4 CLJ 1, FC (refd)

Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor [1998] 1 MLJ 305, CA (refd)

Mohd Zainal Abidin bin Abdul Mutalib v Dato Seri Dr Mahathir bin Mohamed, Minister of Home Affairs, Malaysia and Anor [1989] 3 MLJ 170, SC (folld)

Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri & Anor and another appeal [2014] MLJU 1443; [2014] MLJU 1874 ; [2015] 2 CLJ 328, CA (distd)

Legislation referred to

Federal Constitution arts 10, 10(1)(c), (2)(c), 11, 11(1), (3)(b), (4)

Religion of Islam (State of Selangor) Enactment 2003 s 47

Rules of Court 2012 O 53 r 3
Societies Act 1966 ss 6, 7, 7(3)(a), (3)(d)(i), (3)(d)(ii), 18, 18(b)

Dennis Michael Pereira (Mahendran with him) (Shukor Baljit & Partners) for the applicant.
Mazlifah Ayub (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Azizah Nawawi J:

APPLICATION

[1] The applicants application is for the following orders:

(a) a declaration that the respondent's decision dated 31 May 2016 pursuant to s 18 of the Societies Act 1966 ('Act 335') that rejected the registration of 'Organisasi Hizbut Tahrir Malaysia' ('Hizbut Tahrir') is ultra vires arts 10 and 11 of the Federal Constitution;

(b) a declaration that the respondent's decision dated 31 May 2016 pursuant to s 18 of Act 335 is an irrational decision as the respondent failed to give a fair and an objective consideration to the appeal for the registration of Hizbut Tahrir;

(c) a declaration that the respondent's decision dated 31 May 2016 is an invalid decision since there has been non-compliance of procedural process; and

(d) for an order of certiorari to quash the respondent's decision dated 31 May 2016.

[2] The grounds of the application contained in the statement pursuant to O 53 r 3 of the Rules of Court 2012 are as follows:

(a) that the respondent's decision dated 31 May 2016 which rejected the registration of Hizbut Tahrir has infringed art 10(1)(c) of the Federal Constitution on the freedom to form association;

(b) that the respondent's decision dated 31 May 2016 which rejected the registration of Hizbut Tahrir has infringed art 11 of the Federal Constitution on the freedom of religion as it prevents the applicants from practicing the ideologies of Hizbut Tahrir freely;

(c) that the respondent's decision dated 31 May 2016 which rejected the registration of Hizbut Tahrir has infringed art 11(3)(b) of the Federal Constitution as it prevents the applicants from establishing and maintaining institutions for religious purposes;

A (d) that the respondent's decision dated 31 May 2016 which rejected the registration of Hizbut Tahrir is irrational as the respondent has failed to give reasonable consideration to the applicants appeal; and

(e) there is non-compliance with procedures.

B

[3] Having considered the application and the submission of the parties, this court had dismissed the applicants application with costs.

THE SALIENT FACTS

C

[4] The first applicant is the president whilst the second to the fifth applicants are members of Hizbut Tahrir.

[5] The respondent is the Minister of Home Affairs ('the Minister') responsible for the maintenance and preservation of national security and public order in the country.

D

[6] The applicants have submitted an online application to register Hizbut Tahrir as a society under s 6 of Act 335 with the Registrar of Society ('the ROS') on 29 April 2015, but the application was rejected by the ROS on 24 July 2015.

E

[7] The decision of the ROS is based on s 7(3)(a) of Act 335, where it appears to the ROS that Hizbut Tahrir 'is likely to be used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public order, good order or morality in Malaysia.'

F

[8] The decision of the ROS is based on a letter dated 25 June 2015 from the Jabatan Agama Islam Selangor which states as follows:

G

> ULASAN MENGENAI ORGANISASI HIZBUT TAHRIR — MALAYSIA — NSID-112–1312204
>
> ...
>
> 2. Untuk makluman pihak tuan, fahaman dan ajaran Hizbut Tahrir telah diputuskan oleh Mesyuarat Jawatankuasa Fatwa Negeri Selangor Kali 1/2014 yang bersidang pada 4 Februari 2014 bersamaan dengan 4 Rabiulakhir 1435 sebagai bercanggah dan menyeleweng daripada ajaran Islam yang sebenar menurut pandangan Ahli Sunnah Wal Jamaah.

H

I

[9] On 12 August 2015, the applicants appealed to the Minister against the decision of the ROS pursuant to s 18 of Act 335.

[10] On 17 September 2015, the State of Selangor has *Gazette* the Fatwa under s 47 of the Religion of Islam (State of Selangor) Enactment 2003 that

the:

> Fahaman dan ajaran Hizbut Tahrir adalah bercanggah dan menyeleweng daripada ajaran Islam yang sebenar menurut pegangan Sunnah Wal Jama'ah kerana mengandungi elemen-elemen seperti berikut:
>
> (a) bahawa pemerintah, ahli parlimen dan para ulama Islam kesemuanya kafir serta harus diperangi kerana menerima system kufur;
>
> (b) bahawa negara-negara Islam semuanya negara kafir kerana berhukum dengan system kufur dan haram menyertai system kerajaan sekarang;
>
> (c) menafikan istilah 'al-Qadha'wa al-Qadar';
>
> (d) berpegang kepada fahaman Qadariyyah;
>
> (e) bahawa aqida Siyasiyyah lebih penting daripada ruhiyyah;
>
> (f) menolak sumber aqidah melalui hadith Ahad kerana boleh membawa kepada kesesatan berasaskan hadith Ahad itu dalil zanni sedangkan aqidah itu keyakinan; atau
>
> (g) bahawa nabi dan Rasul tidak maksum sebelum diangkat menjadi Nabi dan Rasul.

[11] Vide a letter dated 31 May 2016, the applicants were informed that the Minister had rejected the applicants appeal.

[12] Hence, the applicants filed this application.

FINDINGS OF THE COURT

[13] The Court of Appeal has laid out the test to review an administrative decision in *Michael Lee Fook Wah v Menteri Sumber Tenaga Manusia, Malaysia & Anor* [1998] 1 MLJ 305, where Shaik Daud JCA said at p 309/D–F:

> First and foremost, it must be emphasized that in an application for certiorari, the High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. The court is more concerned with the decision making process and not the decision itself. The court should not readily question the administrative decision of the first respondent, as that is his absolute discretion. If the first respondent had acted ultra vires, unfairly or unjustly in exercising his discretion, then it is the duty of the courts to interfere in an application for review of that decision. The underlying principle of judicial review have been stated in a number of cases, and it is the exercise by those with whom discretionary power is vested, not in the courts, that the courts are required to review.

[14] The same sentiment was expressed by Justice Mohamad Ariff in *Chan Hon Fun (President and Office Bearer of 'Persatuan Kwong Siew Selangor dan Wilayah Persekutuan') v Pendaftar Pertubuhan & Anor* [2009] MLJU 1700.

A This case involved a challenge to the decision of the Registrar of Society made pursuant to s 7(3)(d)(i) and/or (ii) of Act 335 and the court states as follows:

> The legal issue then becomes an issue of whether there has been a correct exercise of discretion under the relevant provisions of the Societies Act, namely s 7(3)(d)(i) and/or (ii) and s 13. It must be emphasised that this case is a judicial review application for the orders of certiorari and mandamus, and therefore the basic principles of administrative law must govern the situation. *Judicial review relates to the control of the process of administrative decision and this court must be slow to substitute its own views of the matter on the merits.* (Emphasis added.)

[15] In *Booi Kim Lee v Menteri Sumber Manusia & Anor* [1999] 3 MLJ 515, Justice KC Vohrah adopted Lord Diplock's classification of grounds of judicial review in the House of Lords case of *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374. The three grounds described by Lord Diplock are:

(a) illegality;

(b) irrationality; and

(c) procedural impropriety.

[16] By illegality as a ground for judicial review, it means 'that the decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it' and that 'the authority concerned has been guilty of an error of law in its action as for example, purporting to exercise a power which in law it does not possess' (see *Booi Kim Lee*/p 127/b–c).

[17] By irrationality it means '*Wednesbury* unreasonableness' and 'applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided upon could have arrived at it' (see *Booi Kim Lee*/p 127/g).

[18] By procedural impropriety, it includes 'failure by an administrative tribunal to observe procedural rules that are expressly laid out' and 'duty to act fairly' (see *Booi Kim Lee*/p 128/a–d).

[19] In the present application, the applicants are relying on all the above grounds to challenge the decision of the Minister, namely illegality, irrationality and procedural impropriety.

Illegality

[20] Under the heading 'illegality', Justice KC Vohrah in *Booi Kim Lee*'s case

adopted two categories, namely 'ultra vires' and 'irrelevancy'. Ultra vires is when an authority concerned has been guilty of an error of law in its action, such as purporting to exercise a power which in law it does not possess or action in contrary to the policy and objects of the relevant statute. At p 127, it was held that:

> The decision maker must understand correctly the law that regulates his decision making power and must give effect to it.

[21] In the present case, the applicant submits that the Minister's decision is illegal as it contravenes arts 10(1)(c) and 11 of the Federal Constitution.

[22] With regard to art 10(1)(c), the applicants submit that the Minister's decision dated 31 May 2016 is in breach of the said article as it prevents Hizbut Tahrir from being legally registered. Apart from submitting that the Minister's decision has breached art 10(1)(c) of the Federal Constitution, there is nothing in the grounds supporting the application in the statement pursuant to O 53 r 3 of the ROC 2012 or in the affidavit in support, that explains the nature and manner of the alleged breach.

[23] Article 10(1)(c) of the Federal Constitution provides:

> (1) Subject to Clauses (2), (3) and (4):
>
> (a) every citizen has the right to freedom of speech and expression;
>
> (b) all citizens have the right to assemble peaceably and without arms;
>
> (c) all citizens have the right to form association.

[24] Under art 10(1)(c), all citizens have the right to form associations. Article 10(2)(c) empowers Parliament by law to impose such restrictions on the right conferred by art 10(1)(c) 'as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality'.

[25] In the present case, the decision of the ROS is premised on s 7 of Act 335, which reads:

> (1) Upon receipt of an application under section 6, the Registrar shall, subject to the provisions of this section and to such conditions as the Registrar may deem fit to impose, register the local society making the application.
>
> (2) The Registrar may refuse to register a local society if:
>
> (a) he is satisfied that such a society is a branch of any society whose registration has been cancelled under paragraph 13(1)(c); or
>
> (b) he is not satisfied that such local society has complied with the provisions of this act and of the regulations made there under; or

A (c) a dispute exists among the members of such local society as to the persons who are to be office-bearers or to hold or to administer any property of the society until the dispute is decided by a court or by arbitration or by agreement between the members or otherwise.

(3) *The Registrar shall refuse to register a local society where:*

B (a) *it appears to him that such local society* is unlawful under the provisions of this act or any other written law *or is likely to be used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public order, good order or morality in Malaysia*;

C (b) the society has been declared by the Minister to be unlawful under section 5;

(c) the Registrar is satisfied that the society does not exist;

(d) the name under which the society is to be registered:

D (i) appears to the Registrar to mislead or be calculated to mislead members of the public as to the true character or purpose of the society or so nearly resembles the name of such other society as is likely to deceive the members of the public or members of either society;

E (ii) is identical to that of any other existing local society; or

(iii) is, in the opinion of the Registrar, undesirable;

(e) the constitution or rules of the society do not contain provisions for all matters set out in Schedule I to this act or if the society is a mutual benefit

F society, matters set out in Schedule II or any other matters which the Registrar may reasonably require.

(4) Where the Registrar has refused to register a local society under this section, the provisions of section 17 shall apply to that local society.

G (5) Any society that contravenes any condition imposed on it by the Registrar under subsection (1) shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding two thousand ringgit.

[26] The constitutionality of s 7 of Act 335 was considered by the Court of

H Appeal in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ 19, where Justice Gopal Sri Ram held that:

[13] You will note that the section is divided into three parts. The first mandates the ROS to register a society subject to such conditions as he may impose. The second confers a discretion to register a society in certain circumstances. The third

I mandates him not to register a society which falls within one of the categories set out in sub-s 3. The appellant's case comes within s 7(1). Here the ROS imposed the condition — as a matter of departmental policy that he was prepared to register PSM at the national level only if the committee had at least one member from each of the seven States of the Federation. Mr Thomas has submitted that the imposition of this condition amounts to unlawful legislation by the ROS as it is only Parliament

that may impose restrictions. His argument is that the departmental policy of the ROS not to register PSM at the national level is a restriction not authorised by the Constitution. With respect, I think that this argument is fallacious.

[14] As I have already said, the legislative response of Parliament under art 10(2)(c) is the Act itself and for present purposes it is s 7(1). The only issue is whether this is a reasonable legislative restriction. *In my judgment, there is nothing in s 7 that amounts to an unreasonable restriction on the freedom of association conferred by art 10(1)(c). All it does is to regulate the registration of associations to conform with the criteria set out in art 10(2)(c). Accordingly I would hold that s 7(1) is a valid law.* (Emphasis added.)

[27] Therefore, since the decision of the ROS is made pursuant to s 7(3)(a) of Act 335, which was held by the Court of Appeal in *Dr Nasir*'s case to be valid and does not contravene art 10(1)(c) of the Federal Constitution, I am of the considered opinion that the decision of the ROS under s 7(3)(a) and the decision of the Minister under s 18 cannot be said to be ultra vires art 10(1)(c) of the Federal Constitution.

Breach of art 11

[28] In respect of art 11 of the Federal Constitution, the applicants take the position that:

(a) the Minister's decision dated 31 May 2016 which rejected the registration of Hizbut Tahrir has infringed art 11 of the Federal Constitution on the freedom of religion as it prevents the applicants from practicing the ideologies of Hizbut Tahrir freely; and

(b) the Minister's decision dated 31 May 2016 which rejected the registration of Hizbut Tahrir has infringed art 11(3)(b) of the Federal Constitution as it prevents the applicants from establishing and maintaining institutions for religious purposes.

[29] The applicants have submitted that the ROS decision to reject the registration of Hizbut Tahrir, which was affirmed by the Minister, has infringed art 11(1) of the Federal Constitution on the freedom of religion, as it prevents the applicants from practicing the ideologies of Hizbut Tahrir freely. Article 11(1) reads as follows:

Every person has the right to profess and practice his religion and, subject to clause (4), to propagate it.

[30] The word 'practice' is defined in the *Oxford English Dictionary* to include 'performance, execution ...'. In view of the encompassing definition of the word 'practice', the question then is whether all aspects of performing or practicing one's religion is protected by art 11(1) of the Federal Constitution.

[31] Article 11(1) of the Federal Constitution does not protect each and every practice of a religion. It is only the integral practice of the religion, which is obligatory or mandatory on its followers, that invoked the constitutional protection of art 11(1). The test had been established by the Federal Court in *Meor Atiqulrahman bin Ishak (an infant, by his guardian ad litem, Syed Ahmad Johari bin Syed Mohd) & Ors v Fatimah bte Sihi & Ors* [2006] 4 MLJ 605; [2006] 4 CLJ 1, which states as follows:

> [16] I must stress here that; we are only concerned with the words 'practise his religion'. *There is no doubt that the 'integral part of the religion' approach has its merits. Otherwise, in a country with many religions being practised, to allow a regulation or law to be declared unconstitutional just because someone claims that it prohibits his 'religious practice' no matter how trivial it is and even though in a very limited way, would lead to chaos*. However, in my view, that test has its demerits too, because it would lead to the following results: so long as a practice is an integral part of a religion, any restriction or limitation, even regulatory, would be unconstitutional. On the other hand, if the practice is not an integral part of a religion, it can even be prohibited completely. The circumstances under which the law or regulation is made may be such that it is justifiable to restrict or regulate it during a period and at the place when and where it is to operate. A constitution is expected to be in force so long as the country exists but circumstances may change dramatically from time to time, even from place to place. On the other hand, a practice may not be an integral part of the teaching of a religion, in the Islamic sense, it may be a 'sunat' eg, performing the 'sunat' prayers. Using this test, it can be prohibited absolutely and forever. I do not think that is right.
>
> [17] *I am therefore of the view that whether a practice is or is not an integral part of a religion is not the only factor that should be considered. Other factors are equally important in considering whether a particular law or regulation is constitutional or not under art 11(1) of the Federal Constitution.* I would therefore prefer the following approach. *First, there must be a religion*. Secondly, *there must be a practice.* Thirdly, *the practice is a practice of that religion*. All these having been proved, *the court should then consider the importance of the practice in relation to the religion. This is where the question whether the practice is an integral part of the religion or not becomes relevant. If the practice is of a compulsory nature or 'an integral part' of the religion, the court should give more weight to it. If it is not, the court, again depending on the degree of its importance, may give a lesser weight to it.*
>
> [18] In the Islamic context, the classification made by jurists on the 'hukum' regarding a particular practice will be of assistance. Prohibition of a practice which is 'wajib' (mandatory) should definitely be viewed more seriously than the prohibition of what is 'sunat' (commendable).
>
> [19] The next step is to look at the extent or seriousness of the prohibition. A total prohibition certainly should be viewed more seriously than a partial or temporary prohibition. For example, a regulation that prohibits an adult Muslim male from leaving his job to perform the Friday prayer is more serious than a regulation that requires adult male Muslims employees to take turns to perform their 'Asar' prayer, all within the 'Asar' period.

[20] Then, we will have to look at the circumstances under which the prohibition is made. An air traffic controller will have to be at his post even during Friday prayers, where replacement by a non-Muslim or a female employee is not possible. A surgeon who starts an emergency operation just before the 'Maghrib' prayer may have to miss his prayer. (Even the Shariah provides exceptions and relaxation of its application under certain circumstances).

[21] In other words, in my view, all these factors should be considered in determining whether the 'limitation' or 'prohibition' of a practice of a religion is constitutional or unconstitutional under art 11(1) of the Federal Constitution.

[22] Who is to decide? Of course, it has to be the court when the matter comes before the court. *Expert witnesses may be called to assist the court regarding a practise or, in the case of Islam, the issue regarding the 'hukum' of the practice may be referred to the Shari'ah Committees (Fatwa Committees) in the States or the National Fatwa Council*. Such a reference had been made by the Supreme Court in *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1; [1991] 3 CLJ 2768; [1991] 1 CLJ Rep 77. (Emphasis added.)

[32] Therefore, the onus is on the applicants to establish that practicing the ideologies of Hizbut Tahrir is an integral practice of the religion of Islam and is therefore protected by art 11(1) of the Federal Constitution. In the present case, there is nothing in the affidavit affirmed by the applicants to show that practicing the ideologies of Hizbut Tahrir is of a compulsory nature or an integral practice of Islam. There is no expert evidence to support the applicants contention.

[33] What was before the ROS is a letter dated 25 June 2015 from the Jabatan Agama Islam Selangor informing the ROS that 'fahaman dan ajaran Hizbut Tahrir telah diputuskan oleh Mesyuarat Jawatankuasa Fatwa Negeri Selangor Kali 1/Tahun 2014 yang bersidang pada 4 Februari 2014 bersamaan dengan 4 Rabiulakhir 1435 sebagai bercanggah dan menyeleweng daripada ajaran Islam yang sebenar menurut pandangan Ahli Sunnah Wal Jamaah'. Therefore, what is before the ROS is the findings of Jawatankuasa Fatwa that the ideologies and teachings of Hizbut Tahrir has deviated from the true teachings of Islam in accordance with Ahli Sunnah Wal Jamaah.

[34] Therefore, the practice of the ideologies of Hizbut Tahrir is not an integral practice of the religion of Islam and is therefore not protected by art 11(1) of the Federal Constitution. Based on the Fatwa issued by the State of Selangor on 17 September 2015, it is clearly established that practicing the ideologies of Hizbut Tahrir is contrary to the true teachings of Islam in accordance with Sunnah Wal Jama'ah, and amounts to deviant teaching and practices.

[35] The fatwa issued by the State of Selangor under s 47 of the Religion of Islam (State of Selangor) Enactment 2003 is pursuant to art 11(4) of Federal

Constitution, which sets the limits to the freedom of religion and it is subject to propagation:

> (4) State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

[36] Based on art 11(4) of Federal Constitution above, State law and Federal laws can be enacted to control and restrict the propagation of any religious or doctrine or belief among persons professing the religion of Islam. The protection is not just against other religions but includes certain schools of thoughts and opinion within the Islamic Religion itself, such as the deviant ideologies and teachings of Hizbut Tahrir in the present case. In *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119, the court held that:

> *The purpose of this restriction* is to provide the states with the power to pass a law *to protect the religion of Islam from being exposed to the influences* of the tenets, precepts, and practices of other religions or *even of certain schools of thoughts and opinion within the Islamic Religion itself*. (Emphasis added.)

[37] Therefore the findings of the Fatwa Committee and the Fatwa issued by the State of Selangor, which forms the basis of the decision of the ROS and the Minister, is legal and constitutional.

[38] As the fatwa issued by the State of Selangor has declared that the practices of Hizbut Tahrir to be against the true teachings of Islam in accordance with *Sunnah Wal Jama'ah,* then there is no breach with the applicants purported right under art 11(3)(b) of the Federal Constitution. In any event, if the religious institutions are established for the teachings of the ideologies of Hizbut Tahrir, then based on the Fatwa, it will be for an illegal purpose.

Irrationality

[39] The application is also grounded on the issue of 'irrationality'. At p 127 of *Booi Kim Lee*, Justice Vohrah had referred to Lord Diplock's explanation on irrationality to be as follows:

> By 'irrationality', I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

[40] I am of the considered opinion that it cannot be said that the decision of the ROS is irrational as the decision is based on the findings of the Jawatankuasa Fatwa Negeri Selangor that 'fahaman dan ajaran Hizbut Tahrir

(adalah) bercanggah dan menyeleweng daripada ajaran Islam yang sebenar menurut pandangan Ahli Sunnah Wal Jamaah'. A

[41] When the Minister made his decision to dismiss the applicants appeal, the fatwa had been *gazetted* by the State of Selangor which declared the practice and ideologies of Hizbut Tahrir to be a deviant teaching, against the true teachings of Islam in accordance with Ahli Sunnah Wal Jamaah. B

[42] However, it is the submission of the applicants that the Minister's decision dated 31 May 2016 which rejected the registration of Hizbut Tahrir is irrational as the said decision was made on unsubstantiated belief that the organisation will be prejudicial to public order. The applicants further submit that although the Hizbut Tahrir movement has existed in Malaysia since 2009, there is no evidence of it being prejudicial to public order in the country. The applicants relied on the case of *Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) v SIS Forum (Malaysia)* [2012] 6 MLJ 340; [2012] 9 CLJ 297 where the Court of Appeal held that: C D

> (2) If no evidence of actual prejudice to public order was produced, the conclusion must be that no prejudice to public order has occurred. If in the two years the book was in circulation and no prejudice to public order as occurred, hence, it followed that the book was in the first place unlikely to be prejudicial to public order. To be satisfied that the book was prejudicial to public order although in the face of the book there was no prejudice to public order in the two years the book was in circulation, was in such an outrageous defiance of logic that it fell squarely within the meaning of Wednesbury unreasonableness, and of irrationality. E F

[43] However, I am of the considered opinion that both the cases of *SIS Forum (Malaysia)* and *Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri & Anor and another appeal* [2014] MLJU 1443; [2014] MLJU 1874 ; [2015] 2 CLJ 328 relied by the applicants are distinguishable from the present application. G

[44] In *SIS Forum (Malaysia)*, the decision of the Minister was premised on 'prejudicial to public order', not 'likely to be prejudicial to public order'. This can be seen from para 7 of the decision: H

> [7] The appellant had thus relied upon the ground that the Book was prejudicial to public order and not on the ground that it was likely to be prejudicial to public order.

[45] In *Sepakat Efektif Sdn Bhd*, the issue before the Court of Appeal can be seen from para 16: I

> [16] These appeals therefore raise an issue of some importance: to what extent can political cartoons be construed as being prejudicial to public order?

[46] Therefore in the above cases, as the Minister's decision was premised on 'prejudicial to public order', the courts find that the evidence of prejudicial to public order was lacking, as the book concerned and the cartoons involved, had been in circulation before the Minister issued the prohibition order.

[47] In the present case however, the ROS decision was not premised on 'prejudicial to public order', but premised on 'is *likely* to be used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public order, good order or morality in Malaysia'.

[48] Added to that, unlike the said cases where there are evidences of circulation prior to the prohibition order, in the present application there is no evidence established by the applicants to support their assertions, apart from their bare statements, that Hizbut Tahrir had existed since 2009. So before the applicants can blame the ROS or the Minister for failure to prove the issue of prejudicial to public order, it is incumbent for the applicants to establish that Hizbut Tahrir had existed since 2009.

[49] In any event, the Court of Appeal *Sepakat Efektif Sdn Bhd* has set the test at p 352/F–G:

> [47] The relevant test to be adopted has also been stressed: it is whether a reasonable minister similarly situated would have acted in the same manner? It means to say courts can test the exercise of subjective discretion against objective facts in order to determine whether the discretion has been fairly and justly exercised.
>
> [52] In applying the principles of administrative law, *context and subject matter cannot be ignored*. (Emphasis added.)

[50] The decision of the ROS is premised on s 7(3)(a) of Act 335, which reads as follows:

> (3) The Registrar shall refuse to register a local society where:
>
> (a) it appears to him that such local society is unlawful under the provisions of this Act or any other written law or is likely to be used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public order, good order or morality in Malaysia;

[51] In the affidavit affirmed by the Minister, the basis of both the ROS decision and his decision in rejecting the applicants appeal are stated as follows:

> 5.3 Pendaftar Pertubuhan dalam menolak permohonan telah menjalankan kuasanya bawah s 7 Akta Pertubuhan 1966 ['Akta 335'] telah mendapati bahawa *Organisasi tersebut mungkin digunakan bagi apa-apa maksud yang memudaratkan atau yang bertentangan dengan keamanan, kebajikan, keselamatan, ketenteraman awam, ketenteraman atau akhlak di dalam persekutuan berikutan maklumat yang diterima daripada Jabatan Agaman Islam Negeri Selangor bahawa fahaman dan*

ajaran Hizbut Tahrir telah diputuskan oleh Mesyuarat Jawatankuasa Fatwa Negeri Selangor Kali 1/2014 sebagai bercanggah dan menyeleweng daripada ajaran Islam yang sebenar menurut pandangan Ahli Sunnah Wal Jemaah.

Salinan surat bertarikh 25 June 2015 daripada Jabatan Agama Islam Negeri Selangor bertarikh 25 June 2015 adalah dilampirkan dan ditandatangani sebagai ekshibit 'AZ-1'.

5.4 Lanjutan kepada rayuan yang dibuat oleh organisasi tersebut terhadap keputusan Pendaftar Pertubuhan, saya dalam menjalankan kuasa di bawah s 18 Akta 355 telah mempertimbangkan rayuan tersebut dan memutuskan menolak rayuan pendaftaran pertubuhan organisasi tersebut serta mengesahkan keputusan Pendaftar Pertubuhan setelah saya berpuas hati bahawa *Organisasi tersebut mungkin digunakan bagi apa-apa maksud yang memudaratkan atau bertentangan dengan keamanan, kebajikan, keselamatan, ketenteraman awam, ketenteraman atau akhlak di dalam persekutuan memandangkan organisasi tersebut telah didapati oleh Jawatankuasa Fatwa Negeri Selangor sebagai mengamalkan ajaran dan fahaman yang bercanggah dan menyeleweng daripada ajaran Islam yang sebenar menurut pandangan Ahli Sunnah Wal Jemaah*.

5.5 Saya juga percaya dan menyatakan bahawa status pengharaman fahaman dan ajaran Hizbut Tahrir telah diwartakan oleh Kerajaan Negeri Selangor melalui Warta Sel PU 34 bertarikh 17 September 2015.

Salinan warta Sel PU 34 adalah dilampirkan dan ditandakan sebagai ekshibit 'AZ-2'. (Emphasis added.)

[52] Both the ROS and the Minister are of the considered opinion that the registration Hizbut Tahrir, a society that practices deviant teachings which is against the true teachings of Islam, is likely to be used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public order, good order or morality in Malaysia. This is based on the findings by the Fatwa Committee of Selangor that the ideologies and practices of Hizbut Tahrir is deviant teachings and are against the true teachings of Islam.

[53] The objective facts before the ROS and the Minister are the findings of the Jawatankuasa Fatwa Selangor and the Fatwa itself, duly *gazetted* as law in Selangor. The objective facts are that from the expert opinions of members of the Jawatankuasa Fatwa, the ideologies and teachings of Hizbut Tahrir is deviant teachings and is contrary and/or against the true teaching of Islam.

[54] With the above objective facts, the issue then is whether a reasonable minister similarly situated would have acted in the same manner. I am of the considered opinion that the answer is in the positive. The issue of deviant Islamic teachings in Muslim majority Malaysia is a matter of public interest and could affect public order in this country. This had been accepted by the Supreme Court in *Mamat bin Daud* where Salleh Abas LP states as follows:

I accept that to allow any Muslim or groups of Muslim to adopt divergent practices and

A *entertaining differing concept of Islamic religion may well be dangerous and could lead to disunity amongst the Muslim and, therefore could affect public order in the States*. But the power to legislate in order to control or stop such practices is given to the States as can be seen from Article 11 Clause 4:

B (4) State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

It is they alone which can say what should be the proper belief, rule and concept of Islamic religion or what should not be its interpretation and what should be the rule in a particular given situation or case. Clause (4) is a power which enabled the States C to pass a law to protect the religion of Islam. (Emphasis added.)

[55] Therefore, deviant teachings will affect not just the Muslim community but the general public as a whole, as the proliferation of undesirable practices in D the Islamic community would undermine public order. In fact, the Federal Court in the case of *Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors* [2012] 4 MLJ 281; [2012] 4 CLJ 717 has held that in order to safeguard the integrity of the religion Islam at all costs, it is necessary in this day and age for the authority to regulate the teachings and preaching of E the religion in order to control, if not eliminate, deviant teachings. In para 26 of the case, the court held that:

[26] In our judgment, the requirement of tauliah for the purpose of protecting the public interest (maslahah) falls within the concept of *Siyasah Syari'yyah*. Such order and direction are made not merely to prevent deviant teachings, but also to F maintain order and division in the community. Clearly, no one could suggest that the requirement of a tauliah as stipulated in s 53 of the Enactment is a maksiat. *On the contrary, we are of the view that it is necessary in this day and age for the authority to regulate the teachings and preaching of the religion in order to control, if not eliminate, deviant teachings. The integrity of the religion needs to be safeguarded at all costs*. That is what s 53 of the Enactment purports to do. (Emphasis added.) G

[56] Therefore, I am of the considered opinion that it cannot be said that the decision of the ROS refusing the registration of Hizbut Tahrir as a society is an irrational decision. The ROS had considered the applicants application and in H the exercise of his discretion, had rejected the same. I find that the ROS had acted reasonably and properly within his powers.

[57] I am also of the considered opinion that the decision of the Minister in rejecting the applicants appeal is neither ultra vires nor irrational.

I

[58] Added to that, with regards to the Minister's decision, it cannot be said that his decision is irrational as the Fatwa on 'Hizbut Tahrir' is a binding law, albeit only in Selangor pursuant to s 49 of the 2003 Enactment. As such, I agree with the learned Senior Federal Counsel Cik Mazlifah Ayob, that pursuant to

the case of *Mohd Zainal Abidin bin Abdul Mutalib v Dato Seri Dr Mahathir bin Mohamed, Minister of Home Affairs, Malaysia and Anor* [1989] 3 MLJ 170, since the Fatwa on 'Hizbut Tahrir' has declared the same to be a deviant teaching against Sunah Wal Jamaah, the Minister has no other option but to dismiss the appeal of the applicants.

Procedural impropreity

[59] On the issue of procedural impropriety, the applicants submit that the Minister has failed to comply with s 18(b) of Act 335, which provides that any person who is aggrieved by the decision of the ROS under s 7 may appeal to the Minister, who may confirm, reject or vary the decision of the ROS.

[60] The applicants complaint is that in the letter, exh 'AHO4', it is not the Minister who had rejected the applicants appeal, but one Norehan bt Hj Abdullah, who did not have the necessary power and/or jurisdiction to reject the applicants appeal against the ROS decision.

[61] However, I am of the considered opinion that in the letter dated 31 May 2016, the writer is merely informing the applicants that the 'YAB Menteri' had made a decision to reject the applicant's appeal under s 18 of Act 335. This is confirmed by the Minister himself in his affidavit, where he stated that he has made the decision to reject the applicants appeal and that the organisation Hizbut Tahrir was informed of his decision vide a letter dated 31 May 2016 issued by his Ministry. The letter dated 31 May 2016 is merely an administrative letter informing the applicants the decision of the Minister, and the said letter was not part of the decision making process of the Minister. This can be seen clearly from the words 'Perberitahuan Mengenai Keputusan Rayuan'. 'Adalah dimaklumkan' and 'Saya yang menurut perintah'. Therefore, there is no issue of procedural impropriety in this case.

[62] In the case of *Marzuki Abdul Aziz v Ketua Polis Negara* [2003] 3 MLJ 390, the issue before the Court of Appeal is whether there was any flaw in the decision making process when the show cause letter and the dismissal letters were signed by other persons and not by the Deputy Inspector General of Police, the person with the power and authority to dismiss the officer. The court held that the two letters did not form part of the decision making process but are merely administrative letters that conveyed the decisions of the Deputy IGP. The court held as follows:

> The writing of the two letters does not form part of the decision making process as the *two letters merely convey the directive and decisions of the Deputy IGP and form part of the administrative functions of the Deputy IGP for which an officer can be directed to execute*. This is clear from the opening words of the first letter which states as follows: 'Adalah diarahkan memaklumkan ...'. Likewise, the second paragraph of the second

letter contains the following words:

> Dengan ini adalah dimaklumkan setelah menimbang representasi anda dengan teliti dan saksama, YBhg Tan Sri Timbalan Ketua Polis Negara memutuskan.

The two letters were written on the police letter head and based on the opening words in the two letters as afore said, Abdul Aziz must have been a senior officer in the police force. Abdul Aziz does not feature in the decision making process. *What he did was merely to convey the decisions of the Deputy IGP, administrative acts which do not fall within the category of the decision making process.* (Emphasis added.)

CONCLUSION

[63] Premised on the reasons enumerated above, I find no merit in the application and the application is dismissed with costs.

Application dismissed with costs.

Reported by Ashok Kumar